

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

ST. VINCENT CATHOLIC
CHARITIES,

Plaintiff,

v.

INGHAM COUNTY BOARD OF
COMMISSIONERS,

Defendant.

Civil No. 1:19-CV-1050

Hon. Robert J. Jonker

**PLAINTIFF'S
MEMORANDUM IN
OPPOSITION TO
DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Ingham County Board of Commissioners is seeking summary judgment, claiming it acted constitutionally when it denied St. Vincent Catholic Charities a grant to provide refugees with English-language skills, computer skills, and home-purchasing and maintenance assistance. A grant denied even though Commissioners admitted that St. Vincent is the best refugee services provider in town. A grant denied even though the Board admitted that St. Vincent received the same funding with zero concerns lodged the year before. A grant denied even though, as multiple Commissioners admitted, the grant program was designed to “make everyone happy.” A grant denied even though no other applicant was denied in FY2020 and, as the Board admits, this is the first time in at least a decade (if not ever) when the Board disregarded a funding recommendation by the County Controller and zeroed out an applicant for supposedly not meeting the grant criteria.

As the Board admits here, St. Vincent was singled out after several Commissioners spent the preceding three weeks “rais[ing] concerns” about St. Vincent’s religious practices on marriage and lawsuit to defend them (*Buck v. Gordon*). These “concerns” included, as the Board admits,

multiple Commissioners disparaging St. Vincent's religious convictions and—as the undisputed meeting minutes show—at least half the Board seeking to cut off all its refugee contracts with, as one Commissioner said, the “morally bankrupt” St. Vincent.

What goes unmentioned in the Board's motion for summary judgment is what discovery revealed: The Commissioner who moved to zero out St. Vincent's grant did so when another Commissioner—the same one who moved to cut off a St. Vincent refugee contract just two days earlier—told him that St. Vincent applied. The Commissioner's response was swift: “That's a no from me.” This response is unsurprising. As another Commissioner put it, a “majority of this board doesn't approve of, maybe we unanimously don't approve of,” St. Vincent's religious convictions. Another said there are “probably five, six people who are always going to be strongly opposed [to St. Vincent] no matter what.” And, when deposed, the same Commissioner said that the “major issue” behind the grant denial was “the adoptions.”

To the Board, it doesn't matter that all those facts are undisputed. The Board should receive summary judgment because, in its view, St. Vincent

did not satisfy the “basic needs” grant criterion of providing “direct services.” Why? Because, like other funded agencies in FY2019 and FY2020, St. Vincent provided its services through personnel.

What of the Board’s multiple statements of religious intolerance? According to the Board, they’re not “operative” because the “terms” of the Board’s “basic needs” criterion do not contain them. What of the Board unanimously awarding St. Vincent the *same* grant for the *same* services in FY2019? Well, the Board says it previously “failed to spot the problem.” What of the other agencies in FY2019 and FY2020 paying for salaries with their grants rather than “direct services?” To the Board, that’s not a problem—those agencies simply did not “categorize” their budgets “properly.” What of Board choosing to fund an agency in St. Vincent’s place that planned to spend about 90% of its grant on personnel? To the Board, that agency “nominally” complied with the criteria, so it’s okay. The Board may choose to bury its head in the sand when it comes to the material facts, but that is no basis for it to receive summary judgment.

The Board’s motion also fails to show that it is entitled to judgment as a matter of law. The Board ignores the key Sixth Circuit decision analyzing First Amendment and Equal Protection claims (*Meriwether*). It

cramps a key Sixth Circuit retaliation case (*Scarborough*). And the Board cites a key Supreme Court free exercise decision (*Masterpiece*) only once—not even when discussing free exercise, and it still gets the holding wrong. Moreover, the Supreme Court’s recent decision in *Fulton v. Philadelphia* is the death knell. Unanimously, the Court confirmed that the Free Exercise Clause’s neutrality requirement is violated whenever the Government acts with “intolerance” toward a claimant’s religious beliefs. That is precisely what the Board has done here. And *Fulton* might as well have been describing the Board’s “basic needs” policy when it described policies that fail the Free Exercise Clause’s general applicability requirement: those that “invite” governments “to decide which reasons for not complying with the policy are worthy of solicitude.” The Board is therefore required to prove up strict scrutiny. Yet it doesn’t even try.

Summary judgment is only proper for the Board based on the law and the facts as they are—not on what the Board can ignore. The Board’s motion is baseless. It should be denied.

STATEMENT OF UNDISPUTED FACTS

I. The Board does not dispute the key material facts.

As the Board says, “[t]he basic background facts surrounding this case are not in dispute.” Doc. 58 at PageID.1217. St. Vincent’s memorandum supporting its own motion for summary judgment details all the material facts. Doc. 59-1 at PageID.1462-1484. Rather than repeat them, St. Vincent identifies below the key material facts that the Board’s motion either expressly concedes or does not dispute.

A. St. Vincent was denied the very same grant, for the very same services, that it received the prior year.

The Board does not dispute that, as part of contracting with St. Vincent for refugee services over “many years,” it denied St. Vincent a Community Agency Grant in FY2020. Doc. 58 at PageID.1217-1219. Nor is there any dispute that this denial came after “[t]he County Deputy Controller recommended that [St. Vincent] . . . receive some grant funding.” *Id.* at PageID.1218. The Board similarly acknowledges that the grant denial originated with the Board’s Human Services Committee, which just a few weeks earlier “raised concerns” about contracting with St. Vincent. *Id.*

The Board also concedes “the fact that [St. Vincent] received funding for fiscal year 2019 for similar programming.” *Id.* at PageID.1236; *see also id.* at PageID.1220 (acknowledging that the grant evaluation criteria in FY2020 was “not new” and was operative for FY2019, when St. Vincent was funded). Nor does the Board dispute that a review of St. Vincent’s FY2019 and FY2020 grant applications confirms that both applications fund the same services, based on the same budget—even though the FY2019 request was granted while the FY2020 request was denied. *Compare* Doc. 59-13 at PageID.1610-1612 (FY2020 grant application Scope of Work) *with* Doc. 59-20 at PageID.1629-1631 (FY2019 grant application Scope of Work).

Despite agreeing that the Board gave St. Vincent FY2019 grant funding, the Board now argues that “[t]here is no genuine issue of fact that [St. Vincent] failed to meet the criteria for grant funding” for FY2019 (and therefore, for FY2020 too). Doc. 58 at PageID.1227. The Board claims that, by submitting virtually the same grant request in FY2020 that was funded in FY2019, St. Vincent “chose to test the [Board’s] resolve and throw the dice.” *Id.* at PageID.1224.

But the Board does not dispute that every single Commissioner voted in favor of St. Vincent’s FY2019 grant application. *See* Doc. 17-16 at PageID.411, 414 (Resolution 18-467 authorizing St. Vincent \$4,500 with no “Nay” votes). Similarly, the Board does not dispute that multiple Commissioners admitted during depositions that the services St. Vincent sought to provide in both FY2019 and FY2020—English language classes, computer literacy, and home maintenance and purchasing skills—could all satisfy the Board’s criteria. *E.g.*, Doc. 59-5 at PageID.1552-1553 (Morgan Tr. 33:13-34:18 (ESL classes “essential . . . in order to get the services”)); 59-7 at PageID.1578 (Sebolt Tr. 43:17-44:3 (“a case could be made” for job training and language skills as meeting basic needs)); 59-6 at PageID.1567 (Schafer Tr. 92:3-93:1 (ESL, computer literacy, housing maintenance “meet[] a community’s basic needs”)). And while the Board repeatedly characterizes its approval of St. Vincent’s FY2019 grant as an oversight (*e.g.*, Doc. 58 at PageID.1236-1237), the Board does not dispute that Commissioner Sebolt said the following when asked if “the 2019 grant for St. Vincent satisfied the basic needs criteria”: “I voted in support of it, then I would say so, yes.” Doc. 59-7 at PageID.1580 (Sebolt Tr. 54:6-9).

B. Between those two grant applications, Commissioners disparaged St. Vincent and sought to sever ties.

The Board does not dispute that St. Vincent's lawsuit in *Buck v. Gordon* was well known and disliked by multiple Commissioners. *See, e.g.*, Doc. 59-1 at PageID.1470-1472. After this Court granted St. Vincent's request for a preliminary injunction in *Buck*, St. Vincent's refugee services contracts and grants came before the Board. The Board does not dispute the following sequence of events.

November 4, 2019. The Board concedes that, during the November 4, 2019 Human Services Committee meeting, Commissioners "raised concerns" about contracting with St. Vincent. Doc. 58 at PageID.1218. More precisely, as this Court found when denying the Board's motion to dismiss, there were "disparaging statements of multiple Board members regarding St. Vincent's purported views of LGBTQ issues; sincerely held religious beliefs; and position in the *Buck* litigation." Doc. 36 at PageID.947 (Court's opinion). St. Vincent has repeatedly detailed the Board's intolerance at this meeting. *See, e.g.*, Doc. 59-1 at PageID.1473-1475.

Moreover, the Board does not dispute the evidence showing that the "concerns" raised on November 4 were reiterated over the next "three

weeks” (from November 4, 2019 to November 26, 2019). Doc. 58 at PageID.1218, 1230. The Board’s response is to simply characterize three weeks as a lengthy period (e.g., *id.* at PageID.1229-1230, 1246, 1248).

November 6, 2019. Two days after the November 4 meeting, Commissioner Morgan decided to oppose St. Vincent’s FY2020 Community Agency Grant request. Commissioner Sebolt, who at the November 4 meeting moved to defund St. Vincent because of its position in *Buck* and its religious exercise, flagged St. Vincent’s application for Commissioner Morgan. Upon learning via email that the Controller recommended a \$4,500 grant for St. Vincent, Morgan responded: “That’s a no from me.” Doc. 59-15.

Also on November 6—and not disputed by the Board—the County Health Department confirmed that it had been directed to find an alternative to St. Vincent’s refugee services. Jared Cypher, the County’s Deputy Controller, relayed that “the main implication at Human Services was the feeling that SVCC discriminated against people who identify as LGBT.” Doc. 59-22 at PageID.1639. He then directly stated that “the committee . . . directed the Health Department to seek alternatives for interpreter services.” *Id.*

Also on November 6—and undisputed by the Board—an Ingham County Health Department Officer rejected St. Vincent’s request that the Officer make the case for the full Board to keep funding St. Vincent. Doc. 59-23. As the Health Department Officer put it, “I am directly employed by the [Board of Commissioners] and they have provided me direction. It is not appropriate at this point for me to go to a larger group of them and disagree with the direction I’ve been provided.” *Id.* at PageID.1641.

November 8, 2019. Commissioner Tennis told St. Vincent’s CEO that its “discrimination . . . under the guise of religious freedom” “*put me and the rest of my colleagues* in an impossible position.” Doc. 59-16 at PageID.1618 (emphasis added). If St. Vincent did not change its religious practices in foster care and alter its litigating position in *Buck*, “I see no alternative but for the county to explore options that do not compromise *our principles.*” *Id.* (emphasis added).

November 12, 2019. When the full Board met, as the Board acknowledges, it voted to temporarily reauthorize St. Vincent’s refugee health services contract for one more full year. Doc. 58 at PageID.1218. What the Board does not mention—and therefore does not dispute—is why that happened:

[The] amended resolution [i]s a way of trying to get some more time to either figure out how St. Vincent can alter the litigation that they are involved in against the State of Michigan or that our Health Department and our health centers can find alternate providers of this service that will not force us to compromise our principles.

Doc. 17-12 at PageID.380 (Nov. 12 Tr. 72:12-18). This understanding was shared by both opponents of extending St. Vincent’s contract (like Tennis, who wanted to terminate the contract immediately) and supporters (who wanted to temporarily extend the contract to not jeopardize refugee services). *See, e.g., id.* at PageID.380-382.

As Commissioner Naeyaert said in support of extending the contract, “this was not based on the specific six months [extension of St. Vincent’s contract to one full year], it was based on the philosophical issue.” *Id.* at PageID.382 (Nov. 12 Tr. 79:2-4). She supported extending St. Vincent’s contract because “the committee will keep the feet to the fire on this as we conduct business with . . . St. Vincent” and find an alternative if St. Vincent’s religious practices and litigation didn’t change. *Id.* (Nov. 12 Tr. 79:7-9). Similarly, Commissioner Trubac said he would “support” temporarily continuing to contract with St. Vincent so as to not jeopardize refugee services—but he “just want[ed] to add that I absolutely do want to see alternatives so we can start looking at potential changes next year.”

Id. (Nov. 12 Tr. 78:17-19). Trubac’s statements echo those of Tennis, who found the lack of St. Vincent alternatives “truly horrible.” *Id.* at PageID.366 (Nov. 12 Tr. 14:15). And these comments echo those of Commissioners Morgan and Stivers at the November 4 meeting, who “really prefer[red]” that the Health Department provide a “list” of St. Vincent alternatives (Morgan)—and that not doing so was a “shame” (Stivers). Doc. 17-11 at PageID.356.

Confirming that this was the majority sentiment, Commissioner Grebner said that St. Vincent’s “policy” on foster care is “a discriminatory policy *which the majority of this board doesn’t approve of, maybe we unanimously don’t approve[.]*” Doc. 17-12 at PageID.382 (Nov. 12 Tr. 78:1-3) (emphasis added).

To make it clear that no one disagreed, Grebner commented that perhaps the Board’s temporary extension of St. Vincent’s contract (which Grebner supported) should also “include a ‘whereas St. Vincent discriminates against people, we don’t approve of their discrimination and therefore it be resolved that, you know, we really wish St. Vincent would stop.’” *Id.* at PageID.383 (Nov. 12 Tr. 81:19-82:1). This comment was made after the Board voted, so it was not included.

The Board repeatedly claims that only “Three Ingham Commissioners—out of 14—made remarks critical of [St. Vincent’s] role in *Buck v. Gordon* . . . and were ultimately outvoted 11-3” at the November 12 meeting where the interpretive services contract was temporarily reauthorized. Doc. 58 at PageID.1238; *see also id.* at PageID.1218, 1229, 1245, 1246. But the foregoing facts demonstrate that between the November 4 and the November 12 meetings, at least seven Commissioners—half of the Board—expressed a desire to find alternative to St. Vincent because of its religious views and its defense of them in *Buck*. *Supra* 8-12 (Grebner, Morgan, Naeyaert, Sebolt, Stivers, Tennis, Trubac). This evidence is not disputed.

November 13, 2019. Less than 24 hours after the temporary reauthorization of St. Vincent’s contract, the Deputy Controller wrote the Health Department. Doc. 59-24. He wanted to confirm that, notwithstanding the temporary reauthorization, “[t]he direction to explore alternatives [to St. Vincent] still remains[.]” *Id.*

November 18, 2019. Despite St. Vincent being recommended for a FY2020 grant by the County Controller, Commissioner Morgan pulled St. Vincent’s grant recommendation and zeroed the agency out in front

of everyone. Doc. 16-3 at PageID.188. The purported reason for this was the Board did not have “enough money to fund everything,” but “by supporting Refugee Development Center and Haven House” through reallocating St. Vincent’s grant to those agencies, the County “would achieve” its “goal” of “funding for direct aid to the residents.” *Id.*

The Board acknowledged in Requests for Admission (“RFA”) that Refugee Development Center’s application planned to spend \$11,000 of its \$12,250 grant on personnel, including salary and benefits. Doc. 59-4 (RFA #54); *see also* Doc. 16-7 at PageID.207 (proposed budget). Now, however, the Board misstates the facts.

The Board’s brief claims—twice—that Haven House received \$3,750 of St. Vincent’s \$4,500 grant, while Refugee Development Center only received \$750. Doc. 58 at PageID.1223, 1240. The Board then chastises St. Vincent for “mysteriously ignor[ing]” the greater allocation to Haven House. *Id.* at PageID.1240. But the meeting transcript—which the Board block quotes elsewhere—makes clear that it was Refugee Development Center, not Haven House, that received nearly all the grant previously allocated to St. Vincent. *See id.* at PageID.1222 (quoting Commissioner Morgan saying “I would like to remove 4,500 from St. Vincent and add

3,750 to Refugee Development Center and 750 to Haven House.”). The meeting minutes reflect the same. *See* Doc. 16-3 at PageID.188 (in all caps). The Board is simply mistaken.

The undisputed facts show that Commissioner Morgan—with unanimous support (*id.*)—gave over 80% of what would have been St. Vincent’s grant money to an agency that budgeted about 90% of its total grant on personnel.

November 26, 2019. When the full Board met, it unanimously approved the zeroing out of St. Vincent. *See* Doc. 1-1. St. Vincent was the only agency recommended for funding by the Controller to nevertheless receive nothing at all. *See id.*

C. St. Vincent was not denied a grant for reasons of non-discrimination, the Establishment Clause, or because of insufficient County funds.

Throughout this litigation, the Board has advanced several justifications for denying St. Vincent’s FY2020 grant. The Board has argued that St. Vincent failed to satisfy the new “priority” criteria that Commissioner Sebolt had the Board add regarding non-discrimination. Doc. 19 at PageID.422, 433, 435; Doc. 16 at PageID.158; Doc. 39 at PageID.1002 ¶ 16. The Board has also suggested (but refused to say for certain) that

funding St. Vincent could violate the Establishment Clause. Doc. 32 at PageID.808; *see also id.* at PageID.817; Doc. 19 at PageID.445. And in passing, the Board has reiterated the initial justification for zeroing out St. Vincent that Commissioner Morgan gave: “available funds were exhausted and hard decisions had to be made.” Doc. 32 at PageID.823 n.23.

The Board’s brief in support of summary judgment, however, concedes that none of these rationalizations are supported by material facts. *See also* Doc. 59-1 at PageID.1468-1469, 1471-1472, 1478 (St. Vincent explaining how material facts undermine these rationalizations). On the new “priority” given to non-discrimination, the Board now says that it is “immaterial in this case,” and the Board concedes St. Vincent’s representation “that it does not (and to date, has not) discriminate[d]” in violation of the non-discrimination criteria. Doc. 58 at PageID.1221. On the Establishment Clause, the Board now says that “[n]othing in the [Grant] criteria would cause religious agencies to be treated differently from secular agencies.” *Id.* at PageID.1235-1236. And finally, the Board’s briefing is clear that St. Vincent’s recommended FY2020 grant allocation was “transfer[red]” as “additional” funding to other agencies—it did not revert to the County. *Id.* at PageID.1221, 1223. Nor does the Board dispute that

it allocated \$17,300 in supplemental funding from the contingency fund “to cover all Grants approved” by the Controller. Doc. 59-4 (RFA #11).

II. The Board ignores other material facts.

A. The latest justification for denying St. Vincent’s FY2020 grant is unsupported by the material facts.

Having abandoned its prior rationalizations, the Board now introduces a new one: St. Vincent failed to satisfy the Board’s “basic needs” criteria because it supposedly would “be used for the Director [of St. Vincent’s] salary.” Doc. 58 at PageID.1223-1224.

The Board’s only factual support is Commissioner Morgan’s deposition. There, he said that “[s]ometime between November 6th and that meeting, I was made aware that [St. Vincent’s] proposed funding would be going directly to the director’s salary.” Doc. 58 at PageID.1223 (quoting Doc. 59-5 at PageID.1551, Morgan Tr. 28:14-17). Morgan was asked “what brought this issue to [his] attention,” to which he responded: “A conversation—I can’t remember with who it was,” though it was “[c]orrect” to say that it was “between November 6th and November 18th.” Doc. 59-5 at PageID.1551 (Morgan Tr. 29:4-11).

The Board has repeatedly claimed that it can only be liable for “majority votes of its members” as reflected in Board resolutions, and that

“[s]tatements by individual Commissioners or recommendations of Committees do not equate to statements or actions of the [Board] itself.” Doc. 58 at PageID.1239; *see also, e.g., id.* at PageID.1238. The unverified (and false) rumor that supposedly led Commissioner Morgan to zero out St. Vincent, however, does not appear in any Board resolution—nor does it appear in any meeting minutes. Indeed, despite thousands of pages of produced documents and four depositions, the Board cannot identify any fact supporting Commissioner Morgan’s assertion—a claim found nowhere in St. Vincent’s applications or budget. As the Board says, Commissioner Morgan first “explained his rationale for [zeroing out St. Vincent] during his deposition as set forth above.” Doc. 58 at PageID.1227.

Commissioner Morgan’s hazy recollection is also belied by the undisputed facts—which show he opposed St. Vincent’s grant application *on* November 6—not “between November 6th and November 18th.” As discussed *supra* 9, Morgan’s November 6 emails with Commissioner Sebolt make clear that he had “not yet” reviewed the grant funding recommendations. Doc. 59-15. But upon being told that St. Vincent had applied, Morgan’s reply was unequivocal: “That’s a no from me.” *Id.*

The only facts showing how St. Vincent planned to use its FY2020 grant are from its application—and there’s no reference to funding “executive salaries.” Doc. 58 at PageID.1227 (Board’s characterization). Instead, the FY2020 application explains how “STVCC staff” would work “one-on-one” with refugees to teach “[s]mall business development,” and “educating” refugees “on the basics of purchasing a home,” “completing college applications,” “prepar[ing] parents to be able to support their children in school through homework help and correcting basic English grammar,” and “teach[ing] basic computer applications . . . to navigate websites” for employment, education, and homework assistance. Doc. 59-13 at PageID.1612 (FY2020 Scope of Work). Not one document, not one statement, not one resolution, not one mention from any person in any Board meeting transcript supports Morgan’s deposition assertion that St. Vincent’s grant would have paid “executive salaries.”

B. Commissioners and Board practices confirm that funding personnel can directly contribute to meeting basic needs.

As St. Vincent explained at length, the material facts confirm that “[t]he Board has adopted an elastic approach to determine what constitutes ‘contribut[ing]’ to ‘basic needs,’” the criteria for awarding Community Agency Grants. Doc. 59-1 at PageID.1465; *see also id.* at

PageID.1465-1468. The subjectivity is confirmed by the Board’s own request for summary judgment.

For example, in one breath the Board insists that the “basic needs” criteria is a “policy directive clearly set out” to preclude “grant funds to be used for overhead,” like “salaries for [a grantee’s] workforce.” Doc. 58 at PageID.1224. It criticizes St. Vincent for “submitting an application that was directly contrary to and wholly inconsistent with” this policy, because St. Vincent was paying the salaries of those that would facilitate English language, computer literacy, small business development, and home maintenance classes. *Id.*; *supra* 6 (discussing FY2020 Statement of Work). The Board claims that “[St. Vincent] can offer no proof others violated the [basic needs criteria] with impunity—[St. Vincent] has not identified any grant recipient to which a grant was made despite an identified policy violation.” Doc. 58 at PageID.1240.

But in another breath, the Board belies these representations. The Board concedes that Allen Neighborhood Center was funded for FY2020, “[a]lthough ANC’s Project Budget (ING0081) shows \$0 going to ‘direct services.’” Doc. 58 at PageID.1225. The Board does not call this an over-

sight, but instead claims it was permissible because the Allen Neighborhood Center sought funding to “grow[] food in a garden” and to build a kitchen. *Id.* Similarly, the Board concedes that Listening Ear Crisis Intervention received a grant even though it proposed to spend \$0 on “direct services.” *Id.* at PageID.1226. This apparently does not bother the Board either. In the Board’s view, the “figure [is] more properly categorized under ‘Direct Services.’” *Id.*¹

These grants were no anomaly. In FY2019, the Board funded multiple grants which proposed \$0 for direct services—including to Edgewood Village and Listening Ear, both of which proposed \$0 for direct services. Haun Decl. Ex.1 (Edgewood); Haun Decl. Ex.2 (Listening Ear); Resolution 18-476 (funding grants). It also funded Mid-Michigan Recovery Services, which proposed to spend half its grant on personnel, half on rent, and none on direct services. Haun Decl. Ex.3.

¹ The Board also discusses grant funding for Advent House Ministries. Doc. 58 at PageID.1225. But St. Vincent’s reference to funding Advent House (*see, e.g.*, 59-1 at PageID.1468-1469) was to demonstrate that the Board has funded religious ministries without raising any Establishment Clause problem. Despite its prior arguments, the Board now concedes there is no Establishment Clause problem with funding St. Vincent. *Supra* 15-17.

In other instances, the Board justifies awarding grants that go almost entirely to funding personnel salaries—except when it comes to St. Vincent in FY2020.

For example, the Board does not dispute that \$14,000 of Northwest Lansing Healthy Communities Initiative’s \$15,000 grant went to personnel costs. Doc. 58 at PageID.1226; *see also* Haun Decl. Ex.4 (Scope of Work and proposed budget). Instead, the Board justifies this by noting that 3% of the grant (“\$500 of the \$15,000 requested”) was for something budgeted as “other direct services.” Doc. 58 at PageID.1226. But as the application’s Scope of Work puts it: “*The Ingham County grant funds will be used to help cover the salary of a new part-time person to work specifically with formerly incarcerated individuals returning to Ingham County, as well as the costs of a few expenses.*” Doc. 59-11 (emphasis added). So, despite steadfastly refusing to fund St. Vincent’s FY2020 grant because it went to personnel costs, the Board justifies funding this grant because “\$500” went to what the application calls “a few expenses.” *Id.*; *see also* Doc. 58 at PageID.1226 (“\$500 is more than \$0”).

Similarly, the Board concedes that Refugee Development Center (the grantee that received nearly all the FY2020 grant funding initially allocated to St. Vincent) was only going to spend “8% in direct assistance,” with roughly 90% going to salaries. Doc. 58 at PageID.1226.

Indeed, the Board does not dispute that it has previously funded applications that proposed to spend all the funds on salaries. For example, in FY2019, the Board awarded a \$10,000 grant providing matching funds for the salaries of “college advisers,” with no other budgeted expenses. Doc. 59-19 at PageID.1626 (CACAN Budget).

C. St. Vincent’s FY2020 grant application is the only one of 332 in the past decade to allegedly not meet the Board’s “basic needs” criteria.

During discovery, the Board admitted that, with 332 applications in that period, only “on three occasions from FY2010-2020 it did not accept the Controller’s recommendation for Community Agency Grant funding” and, instead, “made adjustments” to award less or no funding to those agencies. Doc. 59-4 at PageID.1536 (RFA #38). As St. Vincent explained—based on the Board’s admissions during discovery—“those three occasions were unusual.” Doc. 59-1 at PageID.1465. One of those three instances was a withdrawn application due to the agency’s closure.

See Doc. 59-4 (RFAs #20-22). In the second of those three instances, an agency's funding was reduced because it exceeded the "cap[]" that the Board places on allowable grant funding. *Id.* (RFAs #25-27). The third was St. Vincent's FY2020 denial—the *only* application in the past decade which was denied for allegedly failing to meet the "basic needs" criteria.

Now, however, the Board criticizes these "statistics" as having "no evidentiary value at all," calling them "purport[ed]" figures "presented by [St. Vincent]." Doc. 58 at PageID.1243-1244. The Board then adds its own statistics, noting that it departs from the Controller's recommendation roughly 12.5% of the time. *Id.* But the Board omits a key fact: all but the three departures already discussed by St. Vincent are *upward*. The Board regularly awards more than the Controller recommends. *Supra* 17 (in FY2020 alone, Board took \$17,300 out of its contingency fund "to cover all grants approved" by the Controller).

Despite its criticisms and misdirection, the Board concedes the essential fact. As it notes: "Controller's Recommendations reduced/rejected: 3." *Id.* at PageID.1243.

D. One Commissioner was enough to target St. Vincent.

Throughout its briefing, the Board claims that the views of individual Commissioners are irrelevant—what matters is whether a “majority” of the Board “ever approved or endorsed or adopted the challenged remarks.” *Id.* at PageID.1246; *see also id.* at PageID.1238, 1241, 1245-1248.

Inconsistently, however, the Board defends Commissioner Morgan’s unilateral discretion to zero out St. Vincent. The Board embraces what Commissioner Morgan explained during his deposition: He defunded St. Vincent and reallocated its grant to two other agencies “[b]ecause I like[d] them [the other agencies]. That’s my prerogative as a legislator.” Doc. 59-5 at PageID.1552 (Morgan Tr. 30:4-5); *see also* Doc. 58 at PageID.1223 (Board brief quoting Commissioner Morgan).

Morgan’s explanation comports with the statements of other Commissioners demonstrating that it takes only one “stubborn” Commissioner to affect grant funding. St. Vincent detailed this undisputed evidence. *See* Doc. 59-1 at PageID.1469-1470.²

² Similarly, St. Vincent also detailed facts about the Board’s ongoing efforts to cut ties with St. Vincent—including funding its FY2021 grant only after the Board met in closed session with its lawyers, and an ongo-

LEGAL STANDARD

“To prevail on a motion for summary judgment, a movant must show—point out—that ‘there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’” *InterVarsity Christian Fellowship/USA v. Bd. of Governors of Wayne State Univ.*, No. 19-10375, 2021 WL 1387787, at *5 (E.D. Mich. Apr. 13, 2021) (quoting Fed. R. Civ. P. 56(a)). The moving party has the burden of “demonstrat[ing] the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “[A]ll reasonable inferences must be made in favor of the non-moving party.” *Moran v. Al Basit LLC*, 788 F.3d 201, 204 (6th Cir. 2015).

Arguments over “[h]ow to characterize” material facts will not suffice. *Douglas v. Muzzin*, No. 1:15-cv-41, 2019 WL 1332015, at *1 (W.D. Mich. Mar. 25, 2019) (Jonker, C.J.) (a characterization dispute “does not preclude summary judgment”). Nor will “conclusory allegations and unsubstantiated assertions.” *Saboury v. City of Lansing*, 366 F. Supp. 3d 928, 932 (W.D. Mich. 2017) (Jonker, C.J.).

ing Request for Proposal (RFP) process to officially end St. Vincent’s refugee interpretive services contract. See Doc. 59-1 at PageID.1480-1484. The Board’s briefing here ignores this evidence entirely.

ARGUMENT

I. The Board violated the Free Exercise Clause.

The Board can only be entitled to summary judgment on St. Vincent’s Free Exercise Clause claim if it shows that the denial of St. Vincent’s FY2020 grant application meets the Clause’s “threshold requirement of being neutral and generally applicable.” *Fulton v. City of Philadelphia*, No. 19-123, 2021 WL 2459253, at *2 (U.S. June 17, 2021); accord *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531-34 (1993).

To this end, the Board makes three arguments.³ Two of them purport to show the Board’s religious neutrality toward St. Vincent. The third claims that the “basic needs” policy is generally applicable. None of these arguments are supported by the material facts or binding law.

³ In a footnote, the Board also claims that St. Vincent’s contracts and grants with the Board mean it has “waive[d] its free exercise rights.” Doc. 58 at PageID.1221 n.2. Wrong—as confirmed by recent Supreme Court precedent. *See Fulton*, 2021 WL 2459253, at *6 (“No matter the level of deference” that might apply in the government contracting context, the Free Exercise Clause’s general applicability requirement applies against a “system of entirely discretionary exemptions.”); *Janus v. AFSCME*, 138 S. Ct. 2448, 2473, 2476 (2018) (invalidating “compelled speech” of even government employees, particularly when speech is on “controversial subjects such as . . . sexual orientation,” which “occupies the highest rung of the hierarchy of First Amendment values”).

A. The Board’s neutrality arguments contradict binding precedent.

The Board’s two arguments for religious neutrality are unsupported by binding law. Tellingly, the Board only cites the primary Supreme Court precedent (*Masterpiece*) once—and not even in its free exercise argument. Doc. 58 at PageID.1246. And the primary Sixth Circuit precedent (*Meriwether*) is not cited by the Board at all.

The Board’s first argument is that “the face of the [basic needs] policy” satisfies the Free Exercise Clause. Doc. 58 at PageID.1235. But as the Supreme Court has long held and the Sixth Circuit just reiterated, “[f]acial neutrality is not determinative.” *Meriwether v. Hartop*, 992 F.3d 492, 514 (6th Cir. 2021) (quoting *Lukumi*, 508 U.S. at 534). Rather, “[t]o determine whether a law is neutral, courts must look beyond the text and scrutinize the history, context, and application of a challenged law.” *Id.* at 512 (citing *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1731 (2018); *Lukumi*, 508 U.S. at 534). The question here is not whether the plain terms the government used are neutral—but whether the government “proceeds in a manner intolerant of religious beliefs.” *Fulton*, 2021 WL 2459253, at *5.

The Board’s second argument for religious neutrality is that only its

“motions and resolutions” are proper evidence of its liability under the Free Exercise Clause. Doc. 58 at PageID.1238. But this is similarly foreclosed by *Masterpiece* and *Meriwether*. The Free Exercise Clause is violated if “unconstitutional animus infected the proceedings.” *Meriwether*, 992 F.3d at 517 (discussing *Masterpiece*). As the Sixth Circuit held, a “proceeding that is fair at the beginning still violates the Free Exercise Clause if it is influenced by religious hostility later.” *Id.* at 516. *Masterpiece* confirms this holding. There, only two members of a “seven-member Commission” manifested religious intolerance, and that intolerance was not disavowed as the case proceeded. *See* 138 S. Ct. at 1729. As *Meriwether* put it, “that was enough.” 992 F.3d at 517 (explaining *Masterpiece*).

Accordingly, even if the Board were right about it being only “[t]hree Ingham Commissioners” that attacked St. Vincent’s religious views (Doc. 58 at PageID.1238)—and it’s not—*Masterpiece* and *Meriweather* show that nose-counting is the wrong metric.⁴ *See supra* 8-12 (half the Board

⁴ The Court’s motion to dismiss decision refutes the Board’s reasoning too. If, as the Board claims, “neither [St. Vincent] nor this Court can inquire into the mind or motives of individual legislators voting on legislation” when determining Free-Exercise liability (Doc. 58 at PageID.1238),

expressly sought to exclude St. Vincent because of its religious convictions).

Here, as the Sixth Circuit just said, courts must “scrutinize the history, context, and application” of the Board’s policy. *Meriweather*, 992 F.3d at 512; *see also id.* at 514 (“courts have an obligation to meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs.”). *Masterpiece* explained that the neutrality inquiry includes any: (1) historical practice showing that the government was not applying a neutral principle but instead was singling out religious exercise; (2) the sequence of events leading to the government’s actions showing religious intolerance; or (3) expressions of intolerance toward religious exercise. *See* 138 S. Ct. at 1729.⁵ Considering these factors, the Board’s claim of neutrality fails.

then what the Board is really saying is that it disagrees with this Court’s prior decision. *See* Doc. 36 at PageID.947 (finding a sufficiently stated free exercise claim partly because of “disparaging statements of multiple Board members”). Moreover, the Supreme Court has long permitted inquiry into legislative motive when assessing constitutional rights violations. *See, e.g., United States v. Windsor*, 570 U.S. 744, 770-71 (2013); *United States v. Lovett*, 328 U.S. 303, 307-14 (1946).

⁵ The Board is simply wrong when it cramps *Masterpiece* to an evaluation of “contemporaneous statement[s]” alone. Doc. 58 at PageID.1247.

B. The Board’s neutrality arguments are contrary to the undisputed facts.

There is a reason why the Board dwells on the plain language of the “basic needs” criteria, and hardly ever cites either the documents it produced or its discovery admissions. When all those other material facts are considered, they paint a damning picture of religious intolerance.

As St. Vincent has detailed above and in its own summary judgment briefing, non-neutrality is evidenced by St. Vincent’s history with the grant program specifically, the Board’s grant practices generally, the sequence of events leading to St. Vincent’s FY2020 grant denial, and the expressions of Commissioner intolerance. *Supra* 8-15; *see also* Doc. 59-1 at PageID.1486-1492.

St. Vincent had never been denied a grant until FY2020—after it filed a lawsuit defending its religious freedom (*Buck v. Gordon*). *Id.* at PageID.1463-1464, 1470-1472. Multiple Commissioners criticized the lawsuit, and it became the impetus for at least half the Board to either

Masterpiece sets forth several “[f]actors relevant to the assessment of governmental neutrality,” only one of which is contemporaneous statements. *See* 138 S. Ct. at 1731 (citation omitted); *see also* *Fulton*, 2021 WL 2459253, at *5 (non-neutrality shown “when [government] proceeds in a manner intolerant of religious beliefs”).

explicitly express their disapproval of St. Vincent during public Board meetings, seek an alternative refugee services provider, or both. *Id.*; *see also supra* 8-12.

The Board does not dispute this sequence of events or disavow any of the intolerant statements toward St. Vincent’s religious convictions. Nor has the Board “questioned” “the quality of St. Vincent’s refugee services.” Doc. 59-4 at PageID.1537 (RFA #41). Rather, as one Commissioner put it—and several others confirmed—“the major issue” for the Board was “the adoptions.” Doc. 59-6 at PageID.1563 (Schafer Tr. 40:13-14); *see also* Doc. 59-16 at PageID.1618 (Tennis email to St. Vincent’s CEO: “The issue before us today, however, concerns how [St. Vincent] treats same-sex couples for adoption services.”); *supra* 8-12 (cataloguing statements made by half the Board during the November 4 and November 12 meetings).

Similarly unaddressed are the emails the Board produced, demonstrating that Commissioner Morgan decided to defund St. Vincent two days after criticizing the Health Department for having no alternative refugee services providers—without having even read the Controller’s recommendation and going solely off of Commissioner Sebolt’s representation. *Supra* 9. Also undisputed are the emails showing that the Health

Department remains under “direction” to replace St. Vincent because Commissioners cannot stand St. Vincent’s religious views on marriage. *Supra* 10. Nor, despite the scare quotes around “statistics,” does the Board dispute that it admitted to only refusing to fund three grants recommended for funding by the Controller in the past decade—and that the other two had extenuating circumstances. *Supra* 23-24. Likewise, the Board offers no explanation for abandoning three of the excuses it previously purported as the real reason for denying St. Vincent a FY2020 grant. *Supra* 15-17 (the new non-discrimination priority; the Establishment Clause; available funds were “exhausted”). Ignoring material facts does not entitle a party to summary judgment.

In claiming neutrality, the Board engages only with two material facts. But these arguments either lack support in—or are outright contradicted by—the material facts.

First, the Board attempts to justify funding St. Vincent’s FY2019 grant request for the same services, based on the same budget, on the ground that Commissioners “failed to spot the problem.” Doc. 58 at PageID.1236; *id.* at PageID.1237. Yet in support, the Board offers nothing but rank speculation—nowhere close to what is required at summary

judgment (*supra* 26). Not a single fact shows that Commissioners were unaware of St. Vincent's FY2019 grant request. Indeed, the Board concedes that it has been partnering with St. Vincent for "many years." *Supra* 5. The most the Board has in support of its claim that Commissioners mistakenly funded St. Vincent is that they "might [have] easily miss[ed] such a detail." Doc. 58 at PageID.1237. This is speculation, and groundless to boot.

What the undisputed facts show is that multiple Commissioners agreed the services St. Vincent sought grant funding for in FY2019 (and thus FY2020 as well) could meet the "basic needs" criteria (*supra* 6-7). The undisputed facts also show that not a single Commissioner voted against St. Vincent's FY2019 grant application. *Supra* 7. Moreover, Commissioner Sebolt was directly asked in his deposition whether St. Vincent's FY2019 grant met the "basic needs" criteria. His response was unequivocal: "I voted in support of it, then I would say so, yes." Doc. 59-7 at PageID.1580 (Sebolt Tr. 54:6-9). This is not a basis to award the Board summary judgment.⁶

⁶ Tellingly, the Board's entire argument section drops any suggestion that St. Vincent was funding "executive salaries."

Second, the Board claims that “comments made by individual Commissioners during meetings relating to the Refugee Services Contract” are irrelevant to the grant denial because the hostile Commissioners were “outvoted” and that contract was renewed. Doc. 58 at PageID.1238. But when renewal was being discussed, Commissioner Naeyaert explained that the extension “was not based on the specific six months,” but on the “philosophical issue” and the desire to keep St. Vincent’s “feet to the fire.” Doc. 17-12 at PageID.382 (Nov. 12 Tr. 79:2-9).

Multiple statements from multiple Commissioners show that the Board sought a way to terminate the County’s relationship with St. Vincent. Or, as Commissioner Tennis put it, the Board asked “our Health Department and our health centers [to] find alternative providers of this service that will not force us to compromise our principles.” *Id.* at PageID.380. While Commissioners disagreed over whether to cut off St. Vincent immediately or only after an alternative was identified, there was no dispute that St. Vincent’s religious views made it verboten. As Commissioner Grebner stated, “the majority of this board doesn’t approve of, maybe we unanimously don’t approve” of St. Vincent’s religious practices. *Id.* (78:1-3).

The Board did not need to wrestle with such qualms with the grant program, however. As multiple Commissioners explained when deposed, the Board plays “favorites” with grants. *See* Doc. 59-1 at PageID.1470 (deposed Commissioners describing the grant process). But that only confirms what St. Vincent has explained: The Board did not apply a religiously neutral standard to St. Vincent. “The major issue,” as a deposed Commissioner put it, was “the adoptions.” *Id.* at PageID.1479. The Board has no response to this evidence. Silence is no basis for summary judgment.

C. The Board continues to single out St. Vincent.

The Board makes passing mentions of St. Vincent receiving FY2021 grant funding and the temporary reauthorization of its interpretive services contract. *See* Doc. 58 at PageID.1238 & n.5. But as St. Vincent has explained at length, the Board only funded St. Vincent’s FY2021 grant after going into closed session with its lawyers (presumably about this case), and St. Vincent’s interpretive services contract is now subject to an ongoing RFP that, to quote Commissioner Tennis, has “absolutely the intent” of finding an alternative to St. Vincent. *See* Doc. 59-1 at PageID.1480-1484 (explaining these facts). These ongoing actions only

reinforce the continued threat of religious intolerance posed by the Board. Summary judgment to the Board cannot, therefore, be warranted.

D. The Board confirms it has no generally applicable policy.

After the Board's motion was filed, the Supreme Court issued a unanimous decision in *Fulton*, where it clarified both the Free Exercise Clause's "neutrality" and "general applicability" requirements. *Fulton*'s neutrality description is already discussed. *Supra* 28.

As to general applicability, *Fulton* confirmed that there are multiple ways to demonstrate that a government policy lacks it. One way, already set forth by the Supreme Court, is "whenever [government regulations] treat *any* comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam) (citing *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67-68 (2020) (per curiam)). Another way is what was at issue in *Fulton*: whenever the government possesses "a formal mechanism for granting exceptions . . . regardless whether any exceptions have been given, because it invites the government to decide which reasons for not complying with the policy are worthy of solicitude." *Fulton*, 2021 WL 2459253, at *7 (cleaned up).

Here, as St. Vincent has explained at length, the Board’s standard for awarding grants is a “moving target”—thereby rendering the Board’s standard not generally applicable and, thus, unable to either avoid or survive strict scrutiny. *Meriwether*, 992 F.3d at 514-15; *see also* Doc. 59-1 at PageID.1493-1496.

Indeed, the Board’s own briefing confirms that the “basic needs” policy is an “exception-ridden policy,” which, as *Fulton* confirmed, is definitionally not generally applicable. *See Fulton*, 2021 WL 2459253, at *7; *see also Ward v. Polite*, 667 F.3d 727, 740 (6th Cir. 2012) (“[E]xception-ridden policy takes on the appearance and reality of a system of individualized exemptions, the antithesis of a neutral and generally applicable policy.”).

Over and over, when applying the basic needs policy, the Board is doing exactly what *Fulton* says is not generally applicable: “decid[ing] which reasons for not complying with the policy are worthy of solicitude.” *Fulton*, 2021 WL 2459253, at *7.

For example, the Board admits to funding agencies that intended to spend virtually every cent on personnel, nothing (or almost nothing) on direct services, or some combination. *Supra* 22. Nor is there any dispute that St. Vincent was funded for the same budgeted services in FY2019.

Supra 6. Nor, finally, does the Board dispute that it reallocated over 80% of what would have been St. Vincent’s grant to Refugee Development Center—which in turn planned to spend over 90% of its grant on personnel. *Supra* 23. Indeed, the Board even recharacterizes certain grant applications—who budgeted nothing at all for “direct services”—so to avoid a contrast with how it treated St. Vincent’s FY2020 grant request. *Supra* 20-21 (defending the funding of Allen Neighborhood Center and Listening Ear).

Even the language the Board uses to describe the standard reveals its subjectivity. *See also* Doc. 59-1 at PageID.1466 (Commissioner Morgan admitting that “different people might have different definitions of” meeting the basic needs policy). The Board’s brief admits that it has funded agencies that “arguably” or “nominally” meet the criteria, even if they cannot “fully satisf[y]” it. Doc. 58 at PageID.1227, 1236, 1240. Only for St. Vincent in FY2020, however, does the policy “clearly” apply to prohibit a grant. *Id.* at PageID.1224.

As *Fulton* confirmed, a policy is not generally applicable when it “invites” the government “to decide which reasons for not complying with the policy are worthy of solicitude.” 2021 WL 2459253, at *7 (cleaned up).

It is hard to imagine a better description of the “basic needs” policy than that. The Board’s policy fails the Free Exercise Clause’s general applicability requirement and therefore requires strict scrutiny.

E. The Board does not even attempt to satisfy strict scrutiny.

The Board “has the burden to establish that the challenged law satisfies strict scrutiny.” *Tandon*, 141 S. Ct. at 1296. Despite this fact, and despite the Board being the moving party here, it makes no strict scrutiny argument at all. Instead, the Board claims strict scrutiny is inappropriate. *See* Doc. 58 at PageID.1239. St. Vincent has already explained that, even if the Board attempted its burden to prove strict scrutiny, it would fail. *See* Doc. 59-1 at PageID.1496-1497.

The Board violated St. Vincent’s free exercise rights and it offers no defense to satisfy strict scrutiny. Having failed to prove its case, the Board’s motion for summary judgment must be denied.

II. For similar reasons, the Board’s conduct compels speech and violates the Equal Protection Clause.

A. The Board may not compel speech by leveraging grant funding.

The Board does not fund St. Vincent’s foster and adoption ministry, a fact that the Board admits. Doc. 59-3 at 13 (#40). Yet the Board seeks to

leverage St. Vincent's speech in its foster program as a condition of funding for an entirely separate program. Such attempted coercion is an unconstitutional condition on speech under the First Amendment. "[T]he Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Agency for Int'l Dev. v. AOSI*, 570 U.S. 205, 214 (2013) (quoting *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 59 (2006)). This means that government may not "demand[] that funding recipients adopt—as their own—the Government's view on an issue of public concern." *Id.* at 218. The Board is attempting to coerce St. Vincent into adopting its views on marriage, and doing so by denying grant funding. This is impermissible under the First Amendment.

The Board's defense on this point simply asserts that statements made by Commissioner Tennis in connection with the refugee services contracts have no bearing on the grant denial, since Commissioner Tennis was absent for that denial. But multiple Commissioners were clear about their desire to penalize St. Vincent. *Supra* 8-12. And the Board has not been able to articulate a legitimate reason for denying St. Vincent's grant in FY2020, after funding the same program in FY2019. The undisputed

facts demonstrate that the Board has no plausible reason for the denial, except to penalize St. Vincent for its protected religious exercise and speech. While the Board is free to express its views, it may not condition unrelated funding on a private agency adopting those views.

B. The grant denial violates the Equal Protection Clause.

The Board claims there is no equal protection violation because (1) St. Vincent was not treated differently than any similarly situated comparator, and (2) St. Vincent’s “statistics” are misleading because the Board doesn’t always follow the Controller’s recommendation. Both arguments fail.

“State actions that treat individuals differently on the basis of a fundamental right trigger strict scrutiny.” *InterVarsity*, 2021 WL 1387787, at *32 (quoting *Ondo v. City of Cleveland*, 795 F.3d 597, 608 (6th Cir. 2015)). This analysis often parallels non-neutrality under the Free Exercise Clause. *See Lukumi*, 508 U.S. at 540 (“we can also find guidance in our equal protection cases”). And it is enough to trigger the Equal Protection Clause here. Because the Board has treated St. Vincent differently based on its exercise of a fundamental right, its actions are subject to strict scrutiny.

Just like the Free Exercise Clause, “[t]he Equal Protection Clause does not tolerate irregular, discriminatory application of ‘neutral’ laws.” *Meriwether*, 992 F.3d at 514 n.9. That is exactly what the Board has done here, singling St. Vincent out and treating it differently than 331 similarly situated applicants. It even treated St. Vincent different from other applicants who spent the great majority of their grants on program personnel, or who allocated \$0 to “direct services.” *Supra* 20-23. The Board’s actions violate the Equal Protection Clause.

III. The Board unlawfully retaliated against St. Vincent.

The Board does not dispute either that St. Vincent has engaged in protected conduct, or that denial of the 2020 Community Agency Grant was adverse action. Doc. 58 at PageID.1244-1252 (disputing only “retaliatory animus”); Doc. 36 at PageID.947-948 (conceding protected conduct); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc) (factors for retaliation claim). The only question, then, is whether the Board withheld the FY2020 grant to penalize St. Vincent for its religious beliefs and exercise. The evidence confirms that it did. Doc. 59-1 at PageID.1500-1503.

A. St. Vincent does not need to prove that a majority of the Board had retaliatory animus—but it has.

The Board argues that St. Vincent must prove that a “majority [of the Board] necessarily subscribed to” retaliatory motives. Doc. 58 at PageID.1246-1247. This is not the law. Instead, St. Vincent must only show that “the adverse action was motivated at least in part by [its] protected conduct.” *Scarborough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 255 (6th Cir. 2006) (quoting *Thaddeus-X*, 175 F.3d at 394). Put another way, the “key question” is “whether a board would have acted the same way, absent improper motive.” *Id.* at 262-63. Once that is established, the burden shifts to the Board, which must prove by a preponderance of the evidence that it “would have taken the same action in the absence of the protected activity.” *Maben v. Thelen*, 887 F.3d 252, 262 (6th Cir. 2018).

As St. Vincent explained at length in support of its own motion for summary judgment, its initial burden to show retaliatory animus is met through the Commissioner’s admissions, overt hostility, and incriminating circumstances. *See* Doc. 59-1 at PageID.1499-1503. The Board, by contrast, fails in its burden to prove that, absent St. Vincent’s defense of its religious convictions, it would have zeroed out its grant request.

In brief, hostility to St. Vincent’s religious views and its efforts to protect its liberty through *Buck* drove the Board’s grant denial. In complaining that St. Vincent “put me and the rest of my colleagues in an impossible position,” Commissioner Tennis confirmed the reason for the Board’s actions: “The issue before us today, however, concerns how [St. Vincent] treats same-sex couples for adoption services.” Doc. 59-16 at PageID.1618. Commissioner Tennis then went on to express how St. Vincent provides “excellent services . . . to the refugee community” and he hoped St. Vincent “can find a way to abide by the county’s position.” *Id.* Otherwise, “I see no alternative but for the [C]ounty to explore options that do not compromise our principles.” *Id.* The threat isn’t implicit—Commissioner Tennis *confirmed* that St. Vincent must either accept the Board’s “position” on same-sex marriage on the (unrelated) foster care and adoption context or lose its ability to serve refugees. *Id.* This is textbook retaliation for religious exercise.

But the retaliation does not stop there. Commissioner Morgan testified that St. Vincent’s stance on adoptions was problematic. Doc. 59-5 at PageID.1556. Summing up the Board’s feelings, County Controller Jared Cypher explained in an email that the perceived issue for the Board was

that St. Vincent “discriminated against people who identify as LGBT.” Doc. 59-22 at PageID.1639. This matched the testimony of Commissioners Schafer and Tennis. Doc. 59-6 at PageID.1563; Doc. 59-8 at PageID.1597. And this sentiment continued throughout the three weeks between the November 4 meeting and the November 18 grant denial before the Human Services Committee. Beyond the above events, an extended exchange at the November 12 Board meeting made clear what Commissioner Grebner said on the record: St. Vincent’s “discriminatory” religious policy is one “which the majority of this board doesn’t approve of, maybe we unanimously don’t approve.” Doc. 17-12 at PageID.382 (78:2-3). *Supra* 8-12.

Equally telling is the absence of “objection to [the disparaging] comments from other commissioners,” which speaks to the consent—if not total agreement—of most Commissioners in punishing St. Vincent.⁷ *Masterpiece*, 138 S. Ct. at 1729. Far from disavowing the inflammatory statements made by Commissioners Tennis, Sebolt, Morgan, and Stivers about St. Vincent at the November 4, 2019 Human Services Committee

⁷ Commissioner Tennis testified that one “stubborn” but “eloquent” board member can drive the outcome of a Board action. Doc. 59-8 at PageID.1595.

meeting, Commissioner Naeyaert expressed a desire “to support my colleagues.” Doc. 17-11 at PageID.357. And at the November 12 meeting, Commissioners Trubac and Grebner added to the chorus of dissatisfaction with St. Vincent’s religious convictions. *Supra* 10-12.

As of that point, at least half the Board was on record manifesting a desire to replace St. Vincent’s refugee services, simply because the Board can’t stand the Catholic ministry’s Catholic convictions. That desire not only led to the Board unanimously zeroing out St. Vincent’s FY2020 grant. It underlies animus that remains today. As Commissioner Schafer candidly explained just this past winter, St. Vincent faces “five, six people who are always going to be strongly opposed no matter what.” Doc. 59-1 at PageID.1481. St. Vincent received a FY2021 grant only after the Board recognized the legal implications of zeroing St. Vincent out again. *Supra* n.2. And there is an RFP going on right now with, as Commissioner Tennis said, “absolutely the intent” of finding an alternative to St. Vincent’s refugee interpretive services. *Supra* n.2 (citing, *inter alia*, St. Vincent’s discussion of Tennis deposition). Taken together, this evidence is more than enough to show that the Board’s conduct toward St. Vincent is at least partially motivated by retaliatory animus.

B. The circumstances surrounding the denial also demonstrate unconstitutional retaliation.

In addition to the manifest hostility, the circumstances surrounding the Board's denial of St. Vincent's FY2020 grant confirm that the denial was retaliatory. "Circumstantial evidence, like the timing of events or the disparate treatment of similarly situated individuals, is appropriate" evidence of retaliation. *Thaddeus-X*, 175 F.3d at 399; see *Holzemer v. City of Memphis*, 621 F.3d 512, 525-26 (6th Cir. 2010) ("[T]emporal proximity provides the necessary circumstantial evidence."). Both proximity of events and disparate treatment are present here.

The temporal link between St. Vincent's seeking relief in *Buck* and the Board's ultimate denial of the Community Agency Grant cannot be denied. *Supra* 8-15; see Doc. 59-1 at PageID.1470-1479 (describing the series of events). At the November 4, 2019 Human Services Committee meeting, Commissioner Sebolt announced his opposition to the contractual relationship with St. Vincent because of its "publicly stated stances and lawsuit against the State of Michigan toward same sex couples." Doc. 17-11 at PageID.354. Commissioner Stivers agreed, calling St. Vincent "morally bankrupt." *Id.* at PageID.358. Commissioner Morgan expressed his dismay at the lack of alternatives to St. Vincent. *Id.* at PageID.356.

Commissioner Tennis said that he shared the “concerns” of his colleagues, but supported a six-month funding extension with St. Vincent in hopes of getting the agency to “come around.” *Id.* at PageID.356, 359.

Only after it became evident that no alternative provider could fulfill the contract did the Board award the full-year contract to St. Vincent. Doc. 59-1 at PageID.1476. Commissioner Tennis called the situation “truly horrible,” and Commissioner Stivers said it was a “shame.” Doc. 17-12 at PageID.356, 366. Commissioner Morgan asked the county Health Department to compile a “list” of alternative providers. *Id.* at PageID.356. Between the November 4 and November 12 meetings, half the Board expressed a desire to replace St. Vincent because of its “discriminatory” religious views—the only question was whether to replace St. Vincent now, or after an alternative provider was identified by the Health Department. *Supra* 8-12.

Just two weeks later, St. Vincent came before the Board’s Human Services Committee again. Doc. 59-1 at PageID.1477. At the Committee meeting, Commissioner Morgan moved to have the \$4,500 that the Controller recommended for St. Vincent reallocated to two other agencies. Doc. 16-3 at PageID.188. Notably, the motion was promptly seconded by

Commissioner Stivers—who just two weeks earlier had aired her disdain for St. Vincent. *Id.* These actions were then approved by the full Board, which unanimously approved the grant denial on November 26. Doc. 36 at PageID.948.

Along with the Board’s manifest retaliatory animus, these facts confirm that far from the Board deserving summary judgment, its motion should be denied and St. Vincent should receive summary judgment. To avoid that outcome, the Board tries to circumvent liability by simply ignoring evidence contrary to its position.

First, the Board simply ignores that it has never questioned the quality of St. Vincent’s work. Rather, time and again, the Board has praised St. Vincent for its ministry. *See, e.g.,* Doc. 59-4 at PageID.1528.

Second, to avoid the manifest hostility toward St. Vincent during the November 4 meeting, the Board, without supporting precedent, flatly asserts that the passage of a mere 22 days makes the November 4 statements irrelevant to the Board approving the grant denial on November 26. *See* Doc. 58 at PageID.1246, 1248. But this claim is contradicted by *Lukumi*, where the Court found unconstitutional hostility toward a church based on various City Council sessions and ordinances from “June

9, 1987” to “September 1987.” *See* 508 U.S. at 526-27. If hostility can be shown over the course of about three months, it can surely be shown over the course of about three weeks.

Third, the Board attempts to avoid the disparate treatment St. Vincent received by re-characterizing other grant applicants and feigning ignorance about St. Vincent receiving the same grant for the same services the year before. *See Holzemer*, 621 F.3d at 525-26 (recognizing the importance of close temporal proximity and other circumstantial evidence in First Amendment retaliation cases); *supra* 6-7, 20-23. Yet as the Board admits, only on three occasions in the past ten years has the Board reduced the funding for an organization below the Controller’s recommendation. Doc. 59-4 at PageID.1536. Two of the occasions were for technical reasons; St. Vincent’s application is the odd man out. *Supra* 23-24.

And not only was St. Vincent treated differently from other organizations recommended for grants by the Controller; its FY2020 application was treated differently from its own prior applications. St. Vincent had received funding in its FY2019 application for the very same services it sought in FY2020. Doc. 59-1 at PageID.1472-1473. No Commissioner expressed any concern for St. Vincent’s FY2019 Scope of Work even though

it was substantively the same as the one submitted in FY2020. *Id.* A more obvious example of disparate treatment is difficult to envision.

As discussed above, in FY2020 alone, the Board funded two other agencies who allocated \$0 to “direct services,” and in both FY2019 and FY2020 the Board awarded grants to multiple agencies proposing to spend the majority on the personnel who provide services. *Supra* 20-23. The Board even reallocated over 80% of the grant that St. Vincent would have received to an agency that would spend about 90% of its total grant on personnel. *Supra* 23. There is no reasonable, nonretaliatory explanation for these differences. The material facts confirm that St. Vincent has met its initial burden.

C. The Board has no rational alternative explanation.

Because St. Vincent has established that its “protected conduct was a motivating factor behind any harm, the burden of production shifts to the defendant.” *Thaddeus-X*, 175 F.3d at 399. The Board must show that it “would have taken the same action in the absence of the protected activity.” *Id.* But the Board fails to demonstrate that neutral criteria led to the grant denial. Instead, as discussed, it simply re-characterizes other grant applications and attempts to shield most of the record from judicial

review.⁸ This doesn't cut it.

For the purposes of summary judgment, “[w]hen opposing parties tell two different stories [and] one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts.” *Scott v. Harris*, 550 U.S. 372, 380 (2007). The record here shows that St. Vincent was targeted for its religious beliefs and its efforts to protect its religious exercise in *Buck*. The Board, by contrast, seeks to evade most of the record. The Board's tactic should be seen for what it is: a tell that it has no factually supported response to the overwhelming evidence of unconstitutional retaliation. Its motion for summary judgment should be denied.

⁸ In addition to claiming that the “basic needs” criteria is facially neutral and that only its “motions and resolutions” can be considered, the Board sweepingly claims that courts cannot probe “illicit intent behind an otherwise valid government action.” Doc. 58 at PageID.1249 (quoting *Grossbaum v. Indianapolis-Marion Cnty. Building Auth.*, 100 F.3d 1287, 1292-96 (7th Cir. 1996)). As explained, the Court already rejected this argument when ruling on the Board's motion to dismiss, and it is belied by the Supreme Court's investigation into motive when constitutional rights are at issue. *Supra* n.4. And in any event, *Grossbaum* is of no help. As it says, “government officials cannot escape a retaliation claim simply by dressing up individualized government action to look like a general rule.” 100 F.3d at 1295. As explained, the material facts indisputably show that the grant criteria is highly subjective and the Board used it to single St. Vincent out. The Supreme Court just confirmed this is unconstitutional. *See Fulton*, 2021 WL 2459253, at *7.

CONCLUSION

This Court should deny the Board's motion for summary judgment, grant St. Vincent's motion for summary judgment, and afford St. Vincent all its requested relief.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the word limit of L. Civ. R. 7.2(b)(i) because, excluding the parts exempted by L. Civ. R. 7.2(b)(i), it contains 10,637 words. The word count was generated using Microsoft Word 2019.

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